

November 8, 1999

General Services Administration
FAR SECRETARIAT (MVR)
1800 F Street, N.W.
Room 4033
ATTN: Laurie Duarte
Washington, D.C. 204505

Dear Ms. Duarte:

The Office of the Chief Counsel for Advocacy of the U.S. Small Business Administration (SBA) was created in 1976 to represent the views and interests of small business in federal policy making activities.¹ The Chief Counsel participates in rulemakings and other federal agency activities when he deems it necessary to ensure proper representation of small business interests. In addition, the Chief Counsel has a particular interest in ensuring that laws and regulations do not have an adverse impact on competition among businesses of differing sizes. Finally, the Chief Counsel monitors agencies' compliance with the Regulatory Flexibility Act (RFA)² and works with federal agencies to ensure that their rulemakings are supported by analyses, available for public comment, of the impact that their decisions will have on small businesses.

In this connection, I am writing regarding FAR case 99-010, Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings. By this letter, I am hereby requesting the postponement of any further action on the proposed regulation until such time as an Initial Regulatory Flexibility Analysis is conducted and published for public comment.

The cited FAR case was published on July 9, 1999 as a Proposed rule with a 120-day comment period. In accordance with the Regulatory Flexibility Act, an agency may certify that "the rule will not have a significant economic impact on a substantial number of small entities," and provide a factual basis for the determination. If, on the other hand a proposed rule is expected to have a significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis (IRFA) must be prepared and published in the Federal Register for public comment.

A certification was provided for FAR case 99-010 stating that there would not be a significant economic impact on a substantial number of small entities and thus an IRFA had not been performed. The July 9, 1999 published proposed regulation attempted to justify its actions by stating that most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive fixed-price basis. The regulation in question revises two sections of the FAR – one dealing with cost principles (Sec.31.205-21) and the other dealing with "contractor responsibility" (Section 9.104-1 (d) and (e)). Assuming for the sake of argument that the statement is correct, namely, that most contracts awarded to small businesses are made under the simplified acquisition procedures, small businesses are not relieved from establishing "contractor responsibility" and can be challenged by contracting officers. Since nearly 23 percent of Federal contract dollars are awarded to small business, changes that affect those contracts affect a significant number of small businesses and need to be justified as required by the Regulatory Flexibility Act. A mere reference to "simplified acquisition procedures," without more, is not factual justification for a certification.

¹ Pub. L. No. 94-305 (codified as amended at 15 U.S.C. §§634a-g, 637.)

² Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. §§601-612.)

The same is true for changes to cost principles, at least to the extent that factual justification must be provided in the regulatory notice if the FAR Secretariat wishes to certify that there is no impact.

Finally, Congress has a lengthy history of expressing its concern for the small business community in the Federal acquisition process. This concern was first expressed in 1942 when it created the Certificate of Competency program. This program provides the small business with certain rights to appeal a contracting officer's "nonresponsibility" determination. Even with procurement reform, Congress has not swayed from its protection of the small business in the area of contractor responsibility.

It is clear that the proposed rule change will not affect the Certificate of Competency program, which is the process through which small businesses can challenge contracting officer's decisions about "contractor responsibility." However, since this rule changes or redefines criteria for determining "contractor responsibility," the preamble to the proposal should make it eminently clear that the Certificate of Competency program remains unchanged and that contracting officers can still use the process to get a small firm certified.

This office stands ready to assist you in any way it can to bring your proposed regulation into compliance with the Regulatory Flexibility Act. Should you have further questions regarding these comments, please feel to contact Major Clark, Assistant General Counsel for Procurement, at (202) 205-7150.

Sincerely yours,

Jere W. Glover
Chief Counsel for Advocacy